Petition

81-1876

No.

Supreme Court, U.S.
FILED
APR 9 1982
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

BARBARA DAVIS,

Petitioner,

v.

RICHARD S. SCHWEIKER,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it was error for the United States Court of Appeals for the District of Columbia to affirm the decision of the trial court when the trial court refused to require the Respondent to meet and the Respondent failed to meet its burden of rebutting a *prima facie* case of sex discrimination.

2. Whether it was error for the United States Court of Appeals for the District of Columbia to affirm the decision of the trial court when the trial court denied Dr. Davis the opportunity to present evidence to show the pretextual nature of the Respondent's justifications for nonpromotion.

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IN THE

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OCTOBER TERM, 1981

BARBARA DAVIS,

Petitioner,

v.

RICHARD S. SCHWEIKER,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Petitioner, BARBARA DAVIS, respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the District of Columbia entered in this proceeding on December 4, 1981 and the Order of January 12, 1982 denying the Petition for Rehearing and rejecting the Suggestion for a Rehearing En Banc.

OPINION BELOW

The United States Court of Appeals for the District of Columbia filed an Order, without opinion, on December 4, 1981 which affirmed the judgment of the United States District Court for the District of Columbia. A copy of the December 4, 1981 Order is attached hereto as Appendix B. On January 12, 1982, the United States Court of Appeals for the District of Columbia entered Orders denying Petitioner's Motion for Rehearing and rejecting the Suggestion for a Rehearing En Banc. Copies of said Orders of January 12, 1982 are attached hereto as Appendices C and D.

JURISDICTION

The Petitioner seeks a Writ of Certiorari to review the Order of the United States Court of Appeals for the District of Columbia entered December 4, 1981 and the Orders of January 12, 1982 denying the Petition for Rehearing and rejecting the Suggestion for a Rehearing En Banc.

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioner respectfully suggests that the relevant statute in this Petition is Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17.

STATEMENT OF THE CASE

This cause involves claims of sexual discrimination in federal employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17

(hereinafter referred to as Title VII). Jurisdiction of this cause was invoked initially in the United States District Court for the District of Columbia pursuant to 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1331. This appeal marks the eleventh year of the process by which the Petitioner, Dr. Barbara Davis, has sought redress and relief for acts of sexual discrimination and reprisals to which she was subjected and which stagnated her career development.

Dr. Barbara Davis is a female citizen of the United States. Dr. Davis, at the time of the first appeal of this case to the United States Court of Appeals for the District of Columbia, was a GS-9 chemist, series 1320, government employee at the National Heart, Lung and Blood Institute (hereinafter NHLBI), National Institutes of Health (hereinafter NIH), of the United States Department of Health, Education and Welfare (hereinafter HEW).

Dr. Davis was hired at NIH as a GS-5 chemist on March 1, 1968. In July, 1968, she began work at NHLBI in the Molecular Disease Branch under the supervision of Dr. Howard Sloan. By 1974, all of the males hired at the same time or immediately after Dr. Davis had been promoted to GS-9. She was not promoted to GS-9 until November, 1975, despite a desk audit of August, 1974 which showed that she had the duties and responsibilities of a GS-9. Statistics presented by Dr. Davis at trial established that Dr. Davis and the other women at NIH were not promoted to high grades like the male employees and, further, that Dr. Davis and other women have not been promoted as rapidly. Said statistics were found by the Court of Appeals to have established a *prima facie* case of sex discrimination. *Davis v. Califano*, 613 F.2d 957 (D.C. Cir. 1979). In addition to not being

promoted, Dr. Davis was denied other job privileges and opportunities accorded to males in similar positions. From 1971 through November, 1978, when she left NIH to work as a chemist at the Environmental Protection Agency, Dr. Davis was subjected to extensive harassment and reprisals.

The Order sought to be reviewed was the second occasion in this cause on which an appeal to the United States Court of Appeals for the District of Columbia was necessitated. On November 8, 1979, the Court of Appeals issued an opinion in this cause, which opinion was filed for the Court by District Judge Robinson. *Davis v. Califano,* 613 F.2d 957 (D.C. Cir. 1979). Therein, that court found that the trial court erred in its determination that Dr. Davis failed to make out a *prima facie* case of discrimination. The Court of Appeals remanded the case to the trial court directing:

> [T]he trial court must determine whether Appellee has sustained its burden of showing either that Appellant's statistical proof is inaccurate or insignificant or that she was denied promotion for lawful reasons. The trial court shall also consider Appellant's allegations of continuing harassment and retaliation dating back to her initial employment with NIH.

Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1979). In connection with the determination to be made on remand, the Court of Appeals directed the trial court to closely scrutinize the Respondent's promotion procedures because said procedures were "highly suspect" and had the "capacity for masking unlawful bias." *Id.* The trial court, however, failed to follow the mandates of this Court on remand and refused to allow or hear further evidence or to review the evidence presented initially in

light of the opinion of the Court of Appeals. Further, as it had done after the trial of the case, the trial court again adopted as its own Conclusions of Law, attached hereto as Appendix A, the Respondent's Conclusions of Law, attached hereto as Appendix E, which was merely a reorganized version of the trial court's first Conclusions of Law on which its opinion was based, which opinion had been reversed by the Court of Appeals. The reorganized version of said conclusions was produced in an effort to present the appearance of compliance with the directions for the remand provided by the opinion of the Court of Appeals. The assumption must be made in view of the principles of justice and judicial economy that the Court of Appeals would not require useless and meaningless acts and, therefore, did not remand this cause for a sham proceeding, but intended that the evidence be given a meaningful review in accordance with its mandates.

In view of the initial opinion of the Court of Appeals and the refusal of the trial court to comply therewith, Petitioner asserts that this case must be reviewed by this Court to secure uniformity of the decisions of the United States Court of Appeals for the District of Columbia by finding that the judgment of that Court issued December 4, 1981 is inconsistent with the opinion issued November 8, 1979 in that it reinforces the sham remand proceedings conducted by the trial court. Further, the judgment of the United States Court of Appeals for the District of Columbia issued December 4, 1981 without opinion demands review by this Court because it is in conflict with other decisions of that Court and with decisions of this Court which have established the applicable burdens of proof in that it affirms a trial court decision resulting from proceedings in which the trial court refused to proceed in accordance with decisions of this Court.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE TRIAL COURT WHEN THE TRIAL COURT REFUSED TO REQUIRE THE RESPONDENT TO MEET AND THE RESPONDENT FAILED TO MEET THE STANDARDS REQUIRED TO REBUT A *PRIMA FACIE* CASE OF SEX DISCRIMINATION.

In remanding this case to the trial court, the United States Court of Appeals for the District of Columbia specifically directed the trial court to make a determination as to whether the Respondent sustained its burden of showing either that Dr. Davis' statistical proof was inaccurate or insignificant or that she was denied promotion for lawful reasons. The trial court failed and refused to comply with those mandates and the Respondent presented no evidence. By affirming the judgment of the trial court on remand, the United States Court of Appeals for the District of Columbia allowed the trial court and the Respondent to evade the effect of its first opinion and the purpose for the remand. In its affirmation, that court has contradicted its own previous decisions and those of this Court.

This Court in *Castaneda v. Partida,* 430 U.S. 482 (1977), held that the state failed to rebut a *prima facie* case of discrimination. This Court found that "discriminatory intent can be rebutted only with evidence in the record about the way in which the Commissioners operated and their reasons for doing so. It was the state's burden to supply such evidence, once respondent established his *prima facie* case." *Id.* at 500. This Court found that the state failed to rebut the presumption by "competent testimony." *Id.* That is the standard for

rebuttal which Respondent should have been required to meet.

In this case, as in *Castaneda v. Partida,* the evidence showed both statistical disparity and discretionary selection procedures. In the first appeal, the United States Court of Appeals for the District of Columbia found that Respondent's promotion procedures are highly suspect and must be closely scrutinized and that "Appellant's statistical *prima facie* case is bolstered by the subjective and ad hoc nature of Appellee's promotion decisions." *Davis,* 613 F.2d at 965.

The Respondent failed to rebut the *prima facie* case as set forth by the findings of the Court of Appeals. The trial court did not require the Respondent to put on any rebuttal evidence. Therefore, Dr. Davis' *prima facie* case of discrimination has not been refuted and judgment should have been rendered in her favor. There is no evidence or "competent testimony" explaining the disparity of hiring, promotions and salary between men and women (which includes Dr. Davis) at NHLBI nor is there any evidence showing that the discretionary promotion procedures of Respondent are nondiscriminatory or lawful.

This Court and the United States Court of Appeals for the District of Columbia have consistently applied the standard which requires the employer to rebut the employee's *prima facie* case of discrimination. *Texas Dept. of Community Affairs v. Burdine,* 101 S. Ct. 1089 (1981); *Furnco Construction Corp. v. Waters,* 436 U.S. 567 (1978); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Day v. Mathews,* 530 F.2d 1083 (D.C. Cir. 1976); *Hackley v. Roudebush,* 520 F.2d 108 (D.C. Cir. 1975).

In *McDonnell Douglas Corp.*, this Court established that after a *prima facie* case of discrimination has been established, the burden must shift to the employer to establish some legitimate, nondiscriminatory reason for the employee's nonselection or nonpromotion. 411 U.S. at 802. The applicability of that burden in such cases was recently reiterated by this Court in *Texas Dept. of Community Affairs v. Burdine,* 101 S. Ct. 1089 (1981). In *Burdine,* the Court stated, "The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination . . . . To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant." *Id.* at 1092.

At no time on remand did the trial court require Respondent to rebut Dr. Davis' *prima facie* case. In fact, the trial court never intended to have Respondent bear any burden.

The Court of Appeals directed the trial court on remand to determine whether Dr. Davis was denied promotion for lawful reasons. The trial court did not follow that mandate or the controlling case law. In addition to its refusal to require the Respondent to rebut the *prima facie* case of discrimination, the trial court entered a decision in favor of the Respondent. The affirmation of that decision by the United States Court of Appeals for the District of Columbia directly conflicts with the prior opinion of that Court in this same case and the controlling decisions of that Court and of this Court.

II.

THE COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE TRIAL COURT WHEN THE TRIAL COURT DENIED DR. DAVIS THE OPPORTUNITY TO PRESENT EVIDENCE TO SHOW THE PRETEXTUAL NATURE OF THE RESPONDENT'S JUSTIFICATIONS FOR NONPROMOTION.

It is firmly established that after an employee has set forth reasons for the employee's nonselection or nonpromotion, the employee must be afforded an opportunity to show that the reason or reasons stated by the employer are not legitimate and are pretextual. *Burdine,* 101 S. Ct. at 1092; *McDonnell Douglas Corp.,* 411 U.S. at 804. The trial court in this case at bar, however, denied Dr. Davis that opportunity. By affirming the trial court's judgment, the United States Court of Appeals for the District of Columbia contradicted the principles and standards of this Court and, further, directly contradicted its own directions to the trial court for remand.

In citing *Furnco Construction Corp. v. Waters,* 436 U.S. 567, 578 (1978), the Court of Appeals, in its November 8, 1978 opinion in this cause, held that when the burden of persuasion shifts back to the Petitioner, she "must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination." *Davis,* 613 F.2d at 962. The trial court erroneously denied Dr. Davis the opportunity to establish the fabricated nature of Respondent's "proffered justification." By affirming the trial court's decision, the Court of Appeals condoned that error.

Dr. Davis has shown that the proffered justifications, including the alleged policy of not promoting employees

while they attended graduate school, were merely subterfuge for discrimination. Having done so, after first establishing her *prima facie* case, Dr. Davis has established that she was discriminated against and is entitled to relief from that discrimination. The refusal of the United States Court of Appeals for the District of Columbia to acknowledge that proof and failure to require the trial court to fully and fairly hear the case demands review by this Court.

The circumstances of this case demand the attention of this Court. To maintain the validity and effectiveness of the statutes designed to protect the rights of employees, this Court must reiterate and reinforce the standards for judicial proceedings in these matters which it has previously established.

The trial court did not merely limit the evidence Dr. Davis presented on remand. The trial court completely denied her right to present any evidence and flatly refused to accept any evidence. Throughout the proceedings, Dr. Davis attempted to present evidence to establish the pretextual nature of the Respondent's justifications.

The transcripts of the status hearings before the trial court on remand are replete with examples of the Petitioner's attempts to present evidence and the absolute refusal of the trial court to allow the presentation of the evidence or even to allow such evidence to be proffered for the record. During a hearing on June 4, 1980, several such interchanges took place.

> MS. CARLBERG [counsel for Petitioner]: I want to put on further evidence through the plaintiff—
>
> THE COURT: No. The plaintiff has testified at length. No need for any further testimony from the plaintiff.

Appendix F, June 4, 1980, Tr. 3-4. During that hearing, counsel for the Petitioner represented to the trial court that in accordance with the mandates of the Court of Appeals requiring that the Petitioner be given the opportunity to present rebuttal evidence, she intended to present the testimony of about four witnesses. Each witness to be offered was rejected and the trial court, in direct conflict with the directions of the Court of Appeals, refused to hear any evidence. The trial court's refusal to hear any evidence caused the remand proceedings to be a mockery of the judicial process.

The sham nature of the remand proceedings is exemplified by the trial court consistently ignoring and discrediting the majority opinion of the Court of Appeals decision and its constant reliance on the dissent.

> THE COURT: —and the Court will hold that, in view of the Court of Appeals Opinion, you have made out a *prima facie* case, but in my previous findings I already found that, in the event you made out a *prima facie* case, it was shown that she was denied promotion for lawful reasons. I have already done that, as Judge McKinnon [dissenting Court of Appeals Judge] so clearly pointed out.

Appendix F, June 4, 1980, Tr. 6. That statement which was made early in the remand process established the tone of proceedings and intent of the trial court to require no evidence from the Respondent, accept no further evidence from the Petitioner and, despite the decision of the Court of Appeals, reenter the same findings of fact, conclusions of law and judgment which had been reversed on appeal.

Those proceedings were condoned by the Court of Appeals in affirming the trial court's judgment. The trial court departed severely from the accepted and

usual course of judicial proceedings. The sanctioning of that departure by the Court of Appeals affirming the judgment rendered as a result of those proceedings, requires this Court to exercise its power of supervision to preserve the dignity of the judicial process.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES DISTRCT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0205

[Filed: Sep. 12, 1980]

BARBARA DAVIS,
Plaintiff,

v.

PATRICIA ROBERTS HARRIS,
Defendant.

ORDER

This action has come on for hearing before this Court after remand by the Court of Appeals. *Davis v. Califano*, Ct. App. No. 78-1398, Ct. App. D.C., November 8, 1979. Dr. Barbara Davis is a white female employee at the National Heart, Lung, and Blood Institute (hereinafter, "NHLBI"), National Institutes of Health (hereinafter, "NIH"), of the United States Department of Health, Education, and Welfare (hereinafter, "HEW"). She alleged unlawful discrimination against her based on her sex, in hiring, promotion, and other conditions of employment, in violation of Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972, 42 U.S.C. § 2000e, *et seq.* Plaintiff's complaint, filed February 12, 1975, sought damages, back pay, overtime pay, promotion to a GS-13 level position, declaratory, injunctive, and other relief. Fol-

lowing a lengthy trial (held November 28, 1977 through December 12, 1977), this Court dismissed the complaint and entered judgment for defendant. In remanding this case on November 8, 1979, the Court of Appeals held that a *prima facie* case of discrimination had been made out and directed that this Court determine "whether Appellee has sustained its burden of showing either that Appellant's statistical proof is inaccurate or insignificant, or that she was denied promotion for lawful reasons." Slip Op. at 19. The Court of Appeals also directed that this Court consider plaintiff's allegations of harassment and retaliation dating back to the time of her initial employment. Slip Op. at 19.

Upon a reexamination of the evidence and complete record in light of the Court of Appeals decision, defendant filed Proposed Supplemental Conclusions of Law on March 7, 1980. Plaintiff opposed these proposed conclusions on March 25, 1980. Further, plaintiff filed Objections to Court's Findings of Fact and Conclusions of Law on July 3, 1980.[1] Defendant responded to these objections on July 29, 1980. A hearing was held on September 11, 1980 to evaluate these pleadings in the context of the Court of Appeals opinion.

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[1] At a status hearing held on June 4, 1980, plaintiff's counsel asked that the case be reopened to permit plaintiff to place further statistical evidence in the record. This Court noted that this was unnecessary since the statistical evidence already in the record established a *prima facie* case of sex discrimination. Plaintiff's counsel also requested that plaintiff be allowed to introduce additional witness testimony. The two requested witnesses, however, had testified at length in the 1977 trial. There is no indication anywhere in the record that the proffered additional testimony of any witnesses would in any way alter this Court's March 8, 1978 Findings of Fact.

This Court has considered the legal memoranda, arguments of counsel, the complete factual and evidentiary record, and the Court of Appeals opinion. It appears to this Court that the statistical evidence already in the record establishes a *prima facie* case of sex discrimination. However, even accepting that the plaintiff has established such a *prima facie* case, the record shows that the defendant more than articulated valid, non-pretextual reasons for the plaintiff's non-promotion and has established that the plaintiff was not harassed or retaliated against in any way. The Findings of Fact, filed by this Court on March 8, 1978, clearly demonstrate this. This Court decided this case after a full trial lasting from November 28 through December 12, 1977. This Court made 139 separate findings of fact. The present record involves 1124 pages of proceedings, including the testimony of 34 witnesses, 4 depositions, and 158 exhibits. Plaintiff has been given every conceivable opportunity to point out any claimed errors in the Findings of Fact and Conclusions of Law submitted by this Court in this action. After complete examination of the issue, this Court concludes that there is no need to supplement the record further, since nothing more is needed for this Court to address the questions as required in the holding of the Court of Appeals.

Thus, upon consideration of defendant's Proposed Supplemental Conclusions of Law, plaintiff's Objections to Court's Findings of Fact and Conclusions of Law, the oppositions and responses thereto, arguments of counsel, the complete factual and evidentiary record, and the Court of Appeals opinion, it is by this Court this 12th day of September, 1980, hereby,

ORDERED, that the Findings of Fact originally filed on March 8, 1978, be refiled as this Court's Findings of Fact; and it is further

ORDERED, that the Conclusions of Law filed on March 8, 1978, be, and the same hereby are, replaced with the following which shall be filed as this Court's Conclusions of Law:

CONCLUSIONS OF LAW

1. Plaintiff's exclusive remedy is provided by Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e-16. See *Brown v. General Services Administration*, 425 U.S. 820 (1976).

2. Plaintiff, through the statistical evidence introduced at trial, has established a *prima facie* case of discrimination against her based on sex. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Davis v. Califano*, ___ U.S. App. D.C. ___, ___ F.2d ___ (1979). Thus, the burden of proof has shifted to the defendant to rebut this showing.

3. Defendant, however, has clearly established through credible and uncontested evidence that plaintiff's non-promotion to an independent investigator position was based solely upon legitimate, non-discriminatory considerations, among which include the fact that: plaintiff's work was not up to par as compared with that of other personnel of NIH, NHLBI, both males and females (Findings of Fact Nos. 48, 83-86, and 88-91); plaintiff's status as a graduate student disqualified her from consideration for such promotions (Findings of Fact Nos. 17-30, 73, and 74), and; plaintiff was not a participant in a fellowship program specifically implemented to provide for the selection of those persons (male and female) with the qualities necessary to be chosen as independent investigators (Findings of Fact Nos. 98, 100, 104, and 126). These facts, coupled with the fact that plaintiff was fully aware that a promotion to an

independent investigator position was not guaranteed even after one completed a fellowship program (Findings of Fact Nos. 102 and 103), clearly establishes that legitimate, non-discriminatory reasons were the basis of defendant's refusal to promote plaintiff and plainly rebuts the inference of sex discrimination raised by plaintiff's *prima facie* case. See *Board of Trustees v. Sweeny,* 439 U.S. 24 (1978); *Furnco Construction Co. v. Waters,* 438 U.S. 567, 576-79 (1978); *McDonnell Douglas Corp. v. Green, supra.* See also, *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 358 (1977).

4. Defendant has proved that there were legitimate and non-discriminatory reasons for her non-promotion (see 3 above), and that they were not a pretext masking illegal sex discrimination as claimed by plaintiff. Thus, defendant has proved that the reasons for plaintiff's failure to be selected were legitimate and not discriminatory. See *McDonnell Douglas Corp. v. Green, supra* at 802-04; *Furnco Construction Co. v. Waters, supra.* See also, *Caro v. Schultz,* 521 F.2d 1084 (7th Cir. 1975), *cert. denied,* 426 U.S. 919 (1976); *Sperling v. United States,* 515 F.2d 645 (3rd Cir. 1975), *cert. denied,* 426 U.S. 919 (1976).

5. The evidence proves that defendant's initial hiring at a low grade, and her non-promotion immediately after one year was in no way due to her sex (Findings of Fact Nos. 2, 3, 6-8, 10, 11; and 13, 15, 16, respectively). The evidence further proves that as to plaintiff's claims regarding her Ph.D. research project (Findings of Fact Nos. 13, 15, and 16), plaintiff's various claims regarding authorship credit, lack of supervision, technician referencing, and seating arrangements at the Journal Club (Findings of Fact Nos. 55-60), and as to plaintiff's

allegations regarding time keeping procedures, the "memorandum of understanding," the ordering of radioactive material, and the writing of a job description (Findings of Fact Nos. 65-71, 72-78, 79-80, and 81-82, respectively), there was no discrimination because of sex nor were any of the actions caused by the filing of a complaint for discrimination. See *Miller v. Williams,* 590 F.2d 317 (9th Cir. 1979); *Novotny v. Great American Federal S&L Ass'n,* 584 F.2d 1235 (3rd Cir. 1978), *rev'd on other grounds,* 439 U.S. 1066 (1979). Defendant has clearly shown by a preponderance of evidence that there is no substance to plaintiff's allegations of continuing harassment and retaliation dating back to her initial employment with NIH. *Brosnahan v. Eckerd,* 18 F.E.P. Case 511, 516 (1977). See also, *Downey v. A. H. Belo Corp.,* 402 F. Supp. 1368, 1376 (N.D. Tex. 1975). Accordingly, it is further,

ORDERED, that judgment be, and the same hereby is, entered for defendant, and that the case be, and the same hereby is, dismissed.

/s/ George L. Hart, Jr.
United States District Judge

APPENDIX B

Not To Be Published—See Local Rule 8(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1981

No. 80-2372

[Filed: Dec. 4, 1981]

BARBARA DAVIS,
Appellant,

v. Civil Action No. 75-00205

RICHARD SCHWEIKER, *ET AL.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: WILKEY and MIKVA, Circuit Judges; and HOWARD T. MARKEY*, Chief Judge, United States Court of Customs and Patent Appeals.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion,

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*Sitting by designation pursuant to 28 U.S.C. § 293(a).

they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court

/s/ George A. Fisher
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1981

No. 80-2372

[Filed: Jan. 12, 1982]

[Argued: 11-13-81]

BARBARA DAVIS,
Appellant,

v. **Civil Action No. 75-00205**

RICHARD SCHWEIKER, *ET AL.*

Before: WILKEY and MIKVA, Circuit Judges and HOWARD T. MARKEY*, Chief Judge, United States Court of Customs and Patent Appeals.

ORDER

On consideration of appellant's petition for rehearing, filed December 31, 1981, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

George A. Fisher
Clerk

By: /s/ Robert A. Bonner
Chief Deputy Clerk

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*Sitting by designation pursuant to Title 28 U.S.C. § 293(a).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1981

No. 80-2372

[Filed: Jan. 12, 1982]

BARBARA DAVIS,
Appellant,

v. **Civil Action No. 75-00205**

RICHARD SCHWEIKER, *ET AL.*

BEFORE: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges.

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

By: /s/ Robert A. Bonner
Chief Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0205

BARBARA DAVIS,
Plaintiff,

v.

PATRICIA ROBERTS HARRIS,
Defendant.

DEFENDANT'S PROPOSED SUPPLEMENTAL CONCLUSIONS OF LAW

In reversing and remanding this case to the trial court, the Court of Appeals held, *inter alia,* that a *prima facie* case of discrimination had been made out and directed that the trial court determine whether the defendant has sustained her burden of showing either that plaintiff's statistical proof is inaccurate or insignificant or that she was denied promotion for lawful reasons. Slip Op. at 19. The Court of Appeals also directed that the trial court consider plaintiff's allegations of harassment and retaliation dating back to the time of her initial employment. *Id.*

The trial court decided this case after a full trial lasting from November 28 through December 12, 1977. The court made 139 separate findings of fact. Even with the conclusion that the plaintiff established a *prima facie* case, as the Court of Appeals has concluded, the record

shows that the defendant more than articulated valid, non-pretextual reasons for the plaintiff's non-promotion and has established that the plaintiff was not harassed or retaliated against in any way. The court's findings of fact demonstrate this and no additional fact finding is necessary. Thus, plaintiff ought not be permitted to supplement the record, since nothing further is needed for this Court to address the questions as required in the holding of the Court of Appeals.

Accordingly, the defendant hereby submits the following as supplemental conclusions of law for the Court's consideration.

Conclusions of Law

1. Plaintiff's exclusive remedy is provided by Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. 2000e-16. See *Brown v. General Services Administration*, 425 U.S. 820 (1976).

2. Plaintiff, through the statistical evidence introduced at trial, has established a *prima facie* case of discrimination against her based on her sex. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Davis v. Califano*, ___ U.S. App. D.C. ___, ___ F.2d ___ (1979). (Thus, the burden of "proof" has shifted to the defendant to rebut that showing.)

3. Defendant, however, has clearly established through credible and uncontested evidence that plaintiff's non-promotion to an independent investigator position was based solely upon legitimate, non-discriminatory considerations, among which include the fact: that plaintiff's work was not up to par as compared with that of other personnel of NIH, NHLBI, both males and females (see Findings of Fact Nos. 48, 83-86 and 88-91, *supra*); that

plaintiff's status as a graduate student disqualified her from consideration for such promotions (see Findings of Fact Nos. 27-30, 73 and 74, *supra*), and; that plaintiff was not a participant in a fellowship program specifically implemented to provide for the selection of those persons (males and females) with the qualities necessary to be chosen as independent investigators (see Findings of Fact Nos. 98, 100, 101, 104 and 126, *supra*). These facts, coupled with the fact that plaintiff was fully aware that a promotion to an independent investigator position was not guaranteed even after one completed a fellowship program (see Findings of Fact Nos. 102 and 103, *supra*), clearly establishes that legitimate, non-discriminatory reasons were the basis of defendant's refusal to promote plaintiff and plainly rebuts the inference of sex discrimination raised by plaintiff's *prima facie* case. See *Board of Trustees v. Sweeny,* 439 U.S. 24 (1978), *Furnco Construction Co. v. Waters,* 438 U.S. 567, 576-79 (1978), and *McDonnell Douglas Corp. v. Green, supra* at 802. See also, *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 358 (1977).

4. Additionally, plaintiff, although afforded every opportunity to show that the reasons offered by defendant for her non-promotion (see 3 above), although on their face legitimate and non sex based, were in actuality a pretext masking illegal sex discrimination, failed to offer any evidence to this effect. Thus, the Court concludes that the reasons for plaintiff's failure to be selected were legitimate and not discriminatory based on a preponderance of the evidence. See *McDonnell Douglas Corp. v. Green, supra* at 802-804; *Furnco Construction Co. v. Waters, supra.* See also *Caro v. Schultz,* 521 F.2d 1084 (7th Cir. 1975), *cert. denied,* 426 U.S. 919 (1976), and *Sperling v. United States,* 515 F.2d 645 (3rd Cir. 1975), *cert. denied,* 426 U.S. 919 (1976).

5. There is simply no evidence that plaintiff's treatment by defendant had anything at all to do with the fact that she had previously filed a complaint of illegal discrimination (indeed, some incidents alleged as reprisal happened prior to the filing of any such complaint): as to her initial hiring at a low grade claim, see Findings of Fact Nos. 2, 3, 6-8, 10 and 11, *supra*; as to her claim of non-promotion immediately after one year, see Findings of Fact Nos. 13, 15 and 16, *supra*; as to her claims regarding her Ph.D. research project, see Findings of Fact Nos. 31-54, 63 and 64, *supra*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Defendant's Proposed Supplemental Conclusions of Law and proposed Order has been mailed this 7th day of March, 1980 to plaintiff's counsel Gwendolyn Jo M. Carlberg, 420 South Washington Street, Alexandria, Virginia 22314.

/s/ David H. Shapiro
Assistant U.S. Attorney
U.S. Courthouse—Rm. 2804A
3rd & Constitution Ave., N.W.
Washington, D.C. 20001
(202) 633-4953

APPENDIX F

EXCERPT

IN THE
UNITED STATES DISTRICT COURT
FOR DISTRICT OF COLUMBIA

Civil Action No. 75-0205

BARBARA DAVIS

v.

JOSEPH A. CALIFANO

Washington, D.C.

June 4, 1980

The above-entitled matter came on on Motion to Attack Government's Conclusions of Law, before THE HONORABLE GEORGE L. HART JR., United States District Judge, pursuant to notice, at 10:00 a.m.

APPEARANCES:

On behalf of the Plaintiff:

GWENDOLYN JO M. CARLBERG, ESQ.,
Attorney at Law

On behalf of the Defendant:

DAVID H. SHAPIRO, ESQ.,
Assistant United States Attorney

PROCEEDINGS

THE COURT: All right Miss Carlberg—what have you got to say about this matter?

MS. CARLBERG: Well, Your Honor—as we read the calendar outside, it says that this is a hearing on argument concerning defendant's proposed supplemental conclusions of law. That is not what my notice says. My notice says to determine whether or not testimony is necessary and to argue defendant's proposed supplemental conclusions of law.

When we were here on the 28th of February you set a status hearing in March giving me time to decide whether or not I wanted to put on additional evidence but that status hearing fell during the time when I was in trial and, due to your absence, this is the first time we have been back to the Court and in the meantime Defendant—

THE COURT: Well I think you were going skiing, too—weren't you?

MS. CARLBERG: Yes, I was gone the week after that trial—yes—and from the time we have been here—from the time we were here in February until today Defendants then put another question before the Court with regard to their proposed supplemental conclusions of law.

If, as I understand their statement, at page one, beginning at paragraph two line three, and I quote:

> "Even with the conclusion that the plaintiff established a prima facie case, as the Court of Appeals has concluded, the record shows the Defendant more than articulated valid, non-pretextual reasons for the plaintiff's non-promotion and had established that the Plaintiff was not harassed or retaliated against in any way."

If the Defendant does not intend to put on any further evidence in this case, but this is their complete and total answer to the Opinion and to the Remand of the Court of Appeals, if that's true, then the Plaintiff is in the position to report to this Court as to whether or not we intend to put on further testimony in the form of rebuttal.

If they are not going to—

THE COURT: Well now, wait a minute. We took the testimony of thirty-four witnesses and four depositions. What additional witnesses do you have which were not available then that you could put on now?

MS. CARLBERG: I'd like to put on further evidence through the plaintiff—

THE COURT: What is that?

MS. CARLBERG: I want to put on further evidenc through the plaintiff—

THE COURT: No. The plaintiff has testified at length. No need for any further testimony from the plaintiff.

MS. CARLBERG: Well Your Honor, things have changed since then and we can refute some of the findings of fact and conclusions of law which this Court made and which the Court of Appeals has found were in error and—if indeed this Court—if we have established a prima facie case and the government does not intend to put on anything else but is going to rely on their conclusions of law which they have submitted prior to our opportunity to come back to this Court and say, yes, we do want to put on rebuttal—then I think that the plaintiff certainly—

THE COURT: Well, answer my question.

MS. CARLBERG: Keeping justice in mind—well—all right. I—

THE COURT: The plaintiff has testified at length and presumably has no new testimony. If she had it—

MS. CARLBERG: Yes—

THE COURT: She should have put it on the first time—

MS. CARLBERG: There is more new testimony and I think we can refute—

THE COURT: Well what would the new testimony be?

MS. CARLBERG: I think it—all right, the new testimony would be that—that some of the testimony based on which this Court made findings of fact and conclusions of law were erroneous put on by the Defendant, and we can prove that. We have documents that have subsequently been put in her official personnel file—secondly, I would like to call Dr. Webster, Marion Webster.

We took her deposition. However, in taking her deposition, the Defendant in their findings of fact and conclusions of law have raised questions that I think we can refute through this woman's testimony.

Thirdly—and—excuse me Judge, let me get the findings of the Court—on the Remand it said:

> "The Court must determine, number one, if the statistical proof is inaccurate or insignificant."

Now, if the government is saying that it is inaccurate or insignificant, and from reading his proposed—that's at page nineteen, Judge—if I understand from his proposed findings of fact and conclusions of law, that he is saying that they are insignificant then—

THE COURT: Well I don't—

MS. CARLBERG: —then we should have the opportunity—

THE COURT: —understand—

MS. CARLBERG: To refute that—

THE COURT: I don't understand that he is saying that.

MS. CARLBERG: Well if he's not then—

THE COURT: —and the Court will hold that, in view of the Court of Appeals Opinion, you have made out a prima facie case, but in my previous findings I already found that, in the event you made out a prima facie case, it was shown that she was denied promotion for lawful reasons. I have already done that, as Judge McKinnon so clearly pointed out.

MS. CARLBERG: Except that Judge McKinnon did not [sic] reverse and remand this to you, Judge, and this is why I asked you to recuse yourself, Judge. I don't think that—I think that you are going right back to the very same conclusion—even though this has been reversed and remanded, you—there might as well from what you are saying today, there might as well have not been any reversal or remand because you are saying in spite of the fact that there was a prima facie case you are going to rule on the same findings of fact and conclusions of law that you held before and you are not going to let the plaintiff put on any rebuttal testimony.

We're in the same position that we were when we—when you made your ruling two years ago—and that's not what the Court of Appeals, in my opinion, meant when they remanded and reversed this case to you. In fact they found that you were in error on page ten and eleven—

* * *

Opposition

Office-Supreme Court, U.S.
FILED
JUL 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1876

In the Supreme Court of the United States

OCTOBER TERM, 1982

BARBARA DAVIS, PETITIONER

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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1. Petitioner, a female employee at the National Heart, Lung, and Blood Institute (NHLBI) of the National Institutes of Health (NIH), brought this employment discrimination action in the United States District Court for the District of Columbia. She alleged that she was discriminated against in promotions and working conditions because of her sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16 (Pet. App. 1a).

The district court conducted a lengthy trial, receiving the testimony of 34 witnesses, depositions from four unavailable witnesses, and 158 exhibits (Pet. App. 3a). At its close, the district court ruled against petitioner, holding that she had failed to establish a prima facie case. Findings of Fact and Conclusions of Law, *Davis* v. *Califano*, Civ. Action No. 75-0205 (filed Mar. 8, 1978), at 23 (hereinafter

Findings). In reaching this conclusion, the district court discounted statistical evidence presented by petitioner on the ground, among others, that a plaintiff "[can]not prove a *prima facie* case of discrimination through statistics alone in an individual, as opposed to a class action" (Findings at 22).

The court of appeals, disagreeing with the district court on this point, reversed and remanded. *Davis* v. *Califano*, 613 F. 2d 957, 962 (D.C. Cir. 1979). The court of appeals directed the district court on remand to determine "whether [respondent] has sustained its burden of showing either that [petitioner's] statistical proof is inaccurate or insignificant, or that she was denied promotion for lawful reasons" (*id.* at 966).

On remand, the district court did not receive any additional evidence, but it held that "the statistical evidence already in the record establishes a *prima facie* case of sex discrimination" (Pet. App. 3a). The district court also ruled, however, that the government "more than articulated valid, non-pretextual reasons for [petitioner's] non-promotion" (*ibid.*). For example, one of petitioner's charges was that she was discriminatorily denied a promotion to the position of independent investigator, but the district court explained that the government (Pet. App. 4a):

> has clearly established through credible and uncontested evidence that [petitioner's] non-promotion to an independent investigator position was based solely upon legitimate, non-discriminatory considerations, * * * includ[ing] the fact that: [petitioner's] work was not up to par as compared with that of other personnel of NIH, NHLBI, both males and females (Findings of Fact Nos. 48, 83-86, and 88-91); [petitioner's] status as a graduate student disqualified her from consideration for such promotions (Findings of Fact Nos. 17-30, 73, and 74), and; [petitioner] was not a participant in a

> fellowship program specifically implemented to provide for the selection of those persons (male and female) with the qualities necessary to be chosen as independent investigators (Findings of Fact Nos. 98, 100, 104, and 126).

Similarly, the district court found that the government had supplied non-pretextual reasons for other refusals to promote petitioner (Pet. App. 5a-6a). The district court also found "by a preponderance of [the] evidence that there is no substance to [petitioner's] allegations" that she was discriminatorily subjected to unfavorable working conditions (*id.* at 6a). The district court accordingly entered judgment in favor of the government (*ibid.*).

The court of appeals summarily affirmed (Pet. App. 7a-8a). A petition for rehearing was denied; no judge requested a vote on petitioner's suggestion for rehearing en banc (*id.* at 9a-10a).

2. Petitioner's principal contention is that the district court's actions on remand were inconsistent with the court of appeals' instructions. See, *e.g.*, Pet. 6, 8, 11. This contention was properly addressed to the court of appeals, which rejected it without difficulty, and does not warrant this Court's review. Similarly, petitioner asserts that she did in fact demonstrate that the government's proffered justifications for not promoting her "were merely [a] subterfuge for discrimination" (Pet. 9-10). But the district court clearly found that the government's reasons were not pretextual, and the court of appeals did not overturn that finding. Accordingly, there is again no reason for this Court to intervene. See, *e.g.*, *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

Petitioner suggests (Pet. 7-8) that the district court did not require the government to rebut her prima facie case. Under *Texas Department of Community Affairs* v.

Burdine, 450 U.S. 248, 254-255 (1981), however, the government could rebut petitioner's prima facie case simply by articulating legitimate reasons for not promoting her. Both the findings entered after the trial and the court of appeals' opinion on the first appeal show that the government developed its reasons for not promoting petitioner at the trial. See, *e.g.*, Findings at 5, 13; *Davis* v. *Califano*, *supra*, 613 F. 2d at 959 & n.12.

Finally, petitioner contends (Pet. 9-11) that the district court's failure to receive additional evidence on remand denied her the opportunity to prove that the reasons given by NIH for not promoting her were pretextual. But petitioner does not explain why she believes that she lacked the opportunity during the lengthy trial to show that NIH's proffered reasons were pretexts. She had every incentive to make such a showing during the trial, for without doing so she had no hope of prevailing. Petitioner does not, and cannot, suggest that she somehow foresaw the course of the proceedings and had a legitimate reason for withholding evidence of pretext during the trial in anticipation of offering it after a remand. In these circumstances, the district court's decision not to receive additional evidence after the remand, a decision that was endorsed by the court of appeals, does not merit further review. See generally *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 331-332 (1971).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JULY 1982

DOJ-1982-07